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7 **UNITED STATES DISTRICT COURT**  
8 **DISTRICT OF NEVADA**  
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10 JAMES CROSS,

11 Petitioner,

12 vs.  
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14 JAMES BENEDETTI, *et al.*,

15 Respondents.  
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3:08-cv-00403-LRH-VPC

ORDER

17 This habeas matter under 28 U.S.C. § 2254 comes before the Court for initial review under Rule  
18 4 of the Rules Governing Section 2254 Cases. Following upon said review, the Court *sua sponte* raises  
19 the question of whether the petition is time-barred because the original petition in this matter was not  
20 filed within the one-year limitation period established in 28 U.S.C. § 2244(d)(1). Petitioner therefore  
21 will be directed to show cause in writing why the petition should not be dismissed with prejudice as  
22 time-barred.

23 ***Background***

24 Petitioner James Cross was convicted, pursuant to a jury verdict, of first degree murder with the  
25 use of a deadly weapon, attempted murder with the use of a deadly weapon, and failure to stop as  
26 required on signal of a police officer.

27 The judgment of conviction was filed on July 15, 1998. The Supreme Court of Nevada affirmed  
28 in an order filed on August 11, 2000. #13, Exhs. 1 & 5.



1           However, under 28 U.S.C. § 2244(d)(2), the federal one-year limitation period is statutorily  
 2 tolled during the pendency of a properly filed application for state post-conviction relief. Petitioner's  
 3 November 2, 2000, state petition therefore statutorily tolled the federal limitation period – without any  
 4 time elapsing – continuously through the issuance of the remittitur on January 17, 2006.

5           The federal limitation period therefore began running following the January 17, 2006, issuance  
 6 of the remittitur. Unless otherwise tolled, the federal limitation period would expire one year later, on  
 7 January 17, 2007.

8           The filing of the first federal petition in No. 2:06-cv-01297-JCM-RJJ did not statutorily toll the  
 9 running of the federal one-year limitation period as to a later petition, such as the present petition. *See*  
 10 *Duncan v. Walker*, 533 U.S. 167, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001).

11           The original petition in this matter was not mailed for filing until July 22, 2008, more than one  
 12 year and six months after the federal limitation period, unless tolled, had expired.

13           Thus, on the face of the record, the petition in this matter is subject to dismissal as time-barred  
 14 under Section 2244(d)(1).

15           In this regard, petitioner is informed that the one-year limitation period may be equitably tolled.  
 16 Equitable tolling is appropriate only if the petitioner can show "'(1) that he has been pursuing his rights  
 17 diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing."  
 18 *Lawrence v. Florida*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1079, 1085, 166 L.Ed.2d 924 (2007) (*quoting Pace v.*  
 19 *DiGuglielmo*, 544 U.S. 408, 418, 125 S.Ct. 1807, 1814, 161 L.Ed.2d 669 (2005)). Equitable tolling is  
 20 "unavailable in most cases," *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir.1999), and "the threshold  
 21 necessary to trigger equitable tolling is very high, lest the exceptions swallow the rule," *Miranda v.*  
 22 *Castro*, 292 F.3d 1063, 1066 (9th Cir.2002)(*quoting United States v. Marcello*, 212 F.3d 1005, 1010  
 23 (7th Cir.2000)). The petitioner ultimately has the burden of proof on this "extraordinary exclusion."  
 24 292 F.3d at 1065. He accordingly must demonstrate a causal relationship between the extraordinary  
 25 circumstance and the lateness of his filing. *E.g., Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003).  
 26 *Accord Bryant v. Arizona Attorney General*, 499 F.3d 1056, 1061 (9th Cir. 2007).

27           Petitioner further is informed that, under certain circumstances, the one-year limitation period  
 28 may begin running on a later date. See 28 U.S.C. § 2244(d)(1)(B), (C) & (D).

1 IT THEREFORE IS ORDERED that, within thirty (30) days of entry of this order, petitioner  
2 shall SHOW CAUSE in writing why the petition, as amended, should not be dismissed with prejudice  
3 as time-barred. If petitioner does not timely respond to this order, the petition will be dismissed with  
4 prejudice as time-barred. If petitioner responds to this order but fails to come forward with specific  
5 facts demonstrating that the petition should not be time-barred, the petition will be dismissed with  
6 prejudice. All assertions of fact must be supported by competent evidence. Any assertions of fact not  
7 made on personal knowledge pursuant to a declaration under penalty of perjury will not be considered.

8 DATED this 17<sup>th</sup> day of February, 2009.

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LARRY R. HICKS  
12 UNITED STATES DISTRICT JUDGE  
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